No. 96 MISC.

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IN THE

Supreme Court of the United States

October Term, 1949.

DAVID DARCY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States.

Term, 1949.

DAVID DARCY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully presents:

I.

Summary Statement of Matter Involved.

Petitioner was convicted of first degree murder and the death penalty was fixed by a jury in the Court of Oyer and Terminer of Bucks County, Pennsylvania, on June 14, 1948. The judgment was affirmed by the Supreme Court of Pennsylvania. The opinion of the court is reported at 362 Pa. 259. On June 24, 1949, a petition for reargument was refused Per Curiam.

The record discloses the following salient facts:

Petitioner, aged 22, was indicted together with three other youths, Harold Foster aged 23, Harry Zietz aged 18, and Felix Capone aged 16, for the murder of one William Kelly.

The theory of the Commonwealth was that Kelly was killed while Zietz, Foster, Capone and petitioner were departing in a moving automobile from the Feasterville Tavern on the Bustleton Pike, Doylestown, Pennsylvania

(288) on the night of December 22, 1947, after having robbed several persons in the Tavern.

Kelly had not been connected with the robbery in any way.

When the automobile pulled away from the Feasterville Tavern, Kelly was standing across the road talking to two friends (581-584). The automobile passed the spot where Kelly was standing. When the auto was 10 to 20 feet away from Kelly (591, 611) two shots were fired by Zietz from the front window on the driver's side. These shots were fired by Zietz with his left hand while he was steering the automobile and shifting gears with his right hand (591, 608, 820-821). He fired because the others said "someone was coming out the door" (821). Kelly was no where near the door. There is no evidence that Zietz aimed his shots at any person or at any particular thing. One bullet struck Kelly in the head, killing him; the other bullet came to rest in a house at the corner of Bustleton Pike and Churchville Road directly across the street from the Tavern. The defendants escaped but were later apprehended in Philadelphia.

(a) *A View Was Conducted, and the Prisoner Was Locked in Jail During that View.*

After the jury was sworn, but before the District Attorney had opened to the jury and before the taking of any testimony, the District Attorney requested that the court permit the jury to visit the Feasterville Tavern (271). The District Attorney's motion was made, as he stated, in order that the jury "might better understand the situs and location of the various parts of the building in question" (271). After an objection by trial counsel for defendant that the viewing would be "prejudicial to the defendant" (271) had been overruled and an exception granted, the court stated (271):

> "These jurors are in charge of the officers, and they will be taken down merely for the purpose of

viewing the locus in quo, that is, the scene of this alleged offense. They are not going down there to investigate or in the capacity of detectives trying to find something, but merely to go down there and get a general view of the scene of the alleged crime."

Then Mr. Achey, trial counsel for defendant, requested that the jury and tipstaves be instructed as to their duties and the court stated (272):

"THE COURT: Members of the jury, in addition to what I have told you as to the purpose of your visiting this place, I say to you that you will be in charge of these tipstaves and you will not discuss this case with them in any way whatsoever. *If you have any questions to ask you will convey your questions to the tipstaves and they will direct it to the officers who will accompany you to give you the answers, if they can.* Under no circumstances are you to talk with anyone who might approach you or come to this place with the idea of talking to you or explaining anything to you, and if they persist you tell them that you are not permitted to listen to them. *Any questions you may have in mind or desire to have answered, you will communicate with your tipstaves and they will relay it to the officer accompanying you.* (Emphasis supplied)

MR. ACHEY: What particular officers does Your Honor refer to?

THE COURT: The Court will be along.

MR. ACHEY: And the district attorney?

THE COURT: And the district attorney and you will be along.

MR. ACHEY: Very good. Who is going to chauffeur them?

THE COURT: The sheriff.

MR. ACHEY: And they will also not communicate with the chauffeurs?

THE COURT: Oh, yes, that includes the chauffeurs or any other person who may be along. The proprietor, you will probably find him there. If you do do not talk to him.

MR. BIESTER: *We direct that the defendant be remanded in the custody of the sheriff.*

THE COURT: *During our absence from the court the defendant will be remanded in the custody of the sheriff and taken to the county prison."* (Emphasis supplied.)

No provision was made for the relatives and friends of petitioner to attend the view, or for the public to do so.

The record does not show that no prejudice to petitioner occurred during or because of the view. Indeed, the court did not even place of record what happened at the view, the identity of all the persons who actually accompanied the jury, where they went, how long they stayed, to whom they talked, what questions they asked, what answers were given or what was done. This is surprising in view of the fact that the court did not adjourn in order to hold the view and therefore the trial was still going on (273, 274).

A day or two before oral argument of petitioner's appeal in the Supreme Court of Pennsylvania, the writer of this petition was informed that witnesses for the prosecution had discussed the crime in the hearing of the jury while the court and jury were in the Tavern. At the suggestion of the writer of this petition trial counsel for petitioner then discussed with the district attorney the question of what had happened during the view. A Stipulation was then entered into by trial counsel for petitioner and the district attorney. The Stipulation was not entered into until after the trial had been concluded, the jury

had been discharged, petitioner had been sentenced to death, and his case was about to be argued in the Supreme Court of Pennsylvania. Having been physically restrained from attending the view, petitioner has not the slightest idea of how accurate or complete the Stipulation is. Therefore it seems to petitioner that the Stipulation between trial counsel for petitioner and the district attorney has no part in this case and is not before this Court.

However, petitioner must discuss the contents of the Stipulation, for at the time of the writing of this Petition petitioner has no way of knowing whether or not this Court will consider the Stipulation. At the same time petitioner contends that his counsel have no more right to bind him by the Stipulation than they would have a right to waive the requirement of petitioner's presence at the view.

The Stipulation may be found at pp. 1-3 of the supplemental record. It indicates that in addition to the fourteen members of the jury there were present at the view the trial judge, the district attorney, the assistant district attorney and trial counsel for petitioner. The Stipulation also says that *three of the prosecution's witnesses at the trial were present in the Tavern when the jury viewed the inside of the Tavern.* The Stipulation specifies that the attention of the jury was directed to certain objects by the court at the request of the district attorney, the assistant district attorney, and trial counsel for petitioner, but in the absence of petitioner. The Stipulation says nothing with regard to whether or not any questions were asked or answered by or for members of the jury during the viewing.

The Stipulation discloses that among the objects pointed out to the jury were "(b) The change in location of the main entrance to the barroom from a side wall to the front wall of the building". The Stipulation is silent as to how such a "change" was pointed out to the jury. Since a "change" is not manifest upon a mere look at a physical object in its changed form, it appears that someone must have described the former condition of the walls and the

former location of the entrance to the jury. Petitioner believes it to be undisputed that neither the trial judge nor the district attorney nor the assistant district attorney nor trial counsel for petitioner had ever been in the Tavern before. Probably one of the witnesses pointed out the change.

The record (405-7, 420-1, 430, 445, 451-2, 465-6, 476, 492-3, 516, 541, 567-8, 655-6, 817) shows that petitioner fired some shots in the Tavern. From the testimony it is not clear whether petitioner fired the shots into the floor or at persons in the premises. Petitioner asserts that had petitioner been present at the view he might have directed the attention of his counsel to the floor so that certain holes in the floor could be pointed out to the jury if they existed. Petitioner asserts that had this been done the jury might have exercised its discretion under the Pennsylvania statute to fix petitioner's penalty at imprisonment for life rather than at death. The reason why the penalty might have been life instead of death is that if the jury had believed that petitioner did not fire at anyone but merely fired into the floor, then the jury might have realized that although petitioner was a bad enough man to go along on an armed hold-up he was not a bad enough man to try to shoot somebody during the course of the hold-up. On the other hand, if the jury believed that petitioner did not fire his gun merely into the floor but actually fired at someone then the jury would be justified in believing that petitioner was not only a bad enough man to go along on an armed hold-up but also that he was so completely anti-social as to take a shot at someone during the hold-up. Without attempting to mitigate the anti-social aspect of any sort of participation in a hold-up, petitioner contends that persons everywhere are more willing to see the death penalty inflicted upon a man who uses his gun upon the person of another than they are upon a man who does not do so.

The Stipulation discloses that among the objects pointed out to the jury was "(h) The position of the card-

board in a second story window in a dwelling house across the street, known as Bustleton Pike". Such a movable object is not properly part of a view. Clearly it would not be in the absence of careful explanation that it was precisely the same as at the time of the occurrence on trial—an explanation which was not made at the view.

The trial court in its charge to the jury said (880):

> "You had the opportunity to visit the premises to better enable you to understand the description of the premises and the various places therein from the witnesses."

This must mean that the view was conducted in order to give the jury an understanding of the evidence *different* (i. e. "better") than the understanding supplied by the testimony and other evidence presented in petitioner's presence.

In affirming petitioner's conviction the Supreme Court of Pennsylvania said that it made no difference whether or not the view was part of the trial and held that under the decisions of the Supreme Court of the United States there was no error in permitting the jury to visit the locus of the crime while petitioner was locked up in jail like an animal who could not be trusted to attend that part of his own trial.

Judge Jones dissented on other grounds and did not reach the question of whether or not the conduct of the view violated due process.

In the Supreme Court of Pennsylvania petitioner assigned the action of the trial court in permitting the view to be held over his objection as error and specifically asserted that it violated his rights to due process under the Fourteenth Amendment to the United States Constitution (R. 935, 936). Having objected to the view itself, petitioner certainly objected to its being conducted during his enforced absence.

There was included in petitioner's brief filed in the Supreme Court of Pennsylvania a statement of "Questions

of Law Involved" which again set forth the federal constitutional question of whether the conduct of the view violated due process.

In affirming the judgment of the court below the Supreme Court of Pennsylvania said (*Commonwealth v. Darcy*, 362 Pa. 259 at 264):

> "The appellants complain that this action of the trial court violated the due process clause of the Fourteenth Amendment to the United States Constitution, violated the defendant's right to be confronted by the witness against him, and violated Article I, Section 9, of the Pennsylvania Constitution."

(b) *The "Presumption" from the Use of a Deadly Weapon.*

The trial court said in its charge to the jury (R. 875):

> "One who uses a deadly weapon upon another at some vital part with a manifest intention to use it upon him, must in the absence of qualifying facts be presumed to know that his act is likely to kill, and knowing this, must be presumed to intend death, which is the probable and ordinary consequence of such an act. Furthermore, when one so uses a deadly weapon upon another without sufficient cause or provocation, he must be presumed to do it wickedly or from a bad heart."

In the Supreme Court of Pennsylvania petitioner assigned this portion of the court's charge to the jury as error (R. 947) and specifically asserted that it violated the due process clause of the Fourteenth Amendment of the United States Constitution.

At page 280 of the Opinion of the Supreme Court of Pennsylvania, 362 Pa. 259, that Court said that petitioner's argument answered itself. At no point did the Supreme Court of Pennsylvania advert to the argument in petition-

er's brief that the so-called presumption of an intent to kill was a "presumption of perfect marksmanship" which was not founded on reason and which therefore violated due process.

As related above, the Supreme Court of Pennsylvania affirmed the judgment and sentence.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 1257 (3) of the Code of Judiciary and Judicial Procedure, 28 U. S. C. A. 1257 (3). The decision sought to be reviewed is a final judgment of the Supreme Court of Pennsylvania, the highest court of that State, affirming a conviction and sentence of death. In the Supreme Court of Pennsylvania petitioner specifically set up and claimed under the Fourteenth Amendment of the Constitution of the United States his right not to be deprived by the Commonwealth of Pennsylvania of his life and liberty without due process of law and his right to be confronted by the witnesses against him.

Petitioner specifically asserts that to have conducted the view over his objection and while he was locked up in jail violated due process. A tavern is no place to hold a trial without the consent of all parties. Furthermore, petioner's right to be present at every stage of the proceedings was violated as was his right to a public trial, and his right to consult with his counsel at every stage of the proceedings.

In the Supreme Court of Pennsylvania petitioner also specifically set up and claimed under the Fourteenth Amendment to the Constitution of the United States his right not to have due process violated by the unreasonable and arbitrary charge of the court with regard to the "presumption" from the use of a deadly weapon.

III.

Questions Presented.

1. Did it violate the due process clause of the Fourteenth Amendment to the Constitution of the United States to hold the defendant in the county prison while sending the jury, during the trial and without adjourning court, to view the Feasterville Tavern?

2. Did it violate the due process clause of the Fourteenth Amendment to the Constitution of the United States to send the jury to view the Tavern over the objection of trial counsel for petitioner?

3. Did the above action of the trial court deprive petitioner of due process by denying him a public trial?

4. Did the above action of the trial court deprive petitioner of due process by denying him the right to be present at every stage of the proceedings against him?

5. Did the above action of the trial court deprive petitioner of due process by denying him the effective assistance of counsel?

6. Did the charge of the trial court as to the presumption from the use of a deadly weapon violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

IV.

Reasons Relied Upon for the Allowance of the Writ.

This case raises at least five important constitutional questions in the administration of criminal law, to wit, (a) the extent of the right of a prisoner to be permitted to be present at every moment of the proceedings against him; (b) the extent of the right to a public trial; (c) the extent of the right to the effective assistance of counsel; (d) the power of a court in the absence of a statute to order a view over the objection of the defendant; (e) the extent

of the right of a defendant to be free from presumptions which lack basis in reason.

The Supreme Court of Pennsylvania has decided these substantial federal questions against petitioner and has affirmed a judgment and sentence of death on the basis of a record disclosing facts which petitioner believes violated due process.

WHEREFORE, your petitioner, David Darcy, respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings therein; and that the order of the Supreme Court of Pennsylvania affirming the judgment and sentence be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

THOMAS D. MCBRIDE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The Opinion of the Supreme Court of Pennsylvania and the dissent are reported in 362 Pa. 259. The opinion of the trial court has not been reported but a certified transcript has been filed with this Court (914).

Statement of Jurisdiction, Questions Presented and Facts.

For brevity there will not be repeated here the statement of jurisdiction, the questions presented and the pertinent factual matter, all of which appear in the petition to which this brief is annexed.

Argument.

I. Summary.

Petitioner's case contains many similarities to *Snyder v. Massachusetts*, 291 U. S. 97. That was the case in which Justice Cardozo wrote the opinion for a Court which divided 5 to 4 and held where a statute empowered courts to hold a view without the consent of the defendant that it did not violate due process to prevent a defendant from attending a view if he was furnished with a stenographic transcript of what took place at the view. In petitioner's case no stenographic record was made at the view. Accordingly petitioner not only makes a frontal attack on *Snyder v. Massachusetts* but also asserts that if *Snyder v. Massachusetts* applies to petitioner's case at all, it indicates that due process was violated. Petitioner also contends that the conduct of the view violated his right to a public trial, his right to have the effective assistance of counsel, and his right that a view not be held over his objection.

Finally petitioner attacks the trial court's charge with regard to the presumption from the use of a deadly weapon.

II. Snyder v. Massachusetts, 291 U. S. 97, Was Wrongly Decided.

In *Snyder v. Massachusetts,* 291 U. S. 97, this Court held where a statute empowered the court to order a view regardless of whether defendant consented that it did not violate due process to conduct a view in the absence of a defendant who had made demand that he be present, provided that he be furnished during the trial with a transcript setting forth what took place at the view.

It is wrong to lock a defendant in jail while the jury goes out to visit the locus of the alleged crime. The jury is sure to draw the inference that the man on trial is a bad man, practically an animal, who cannot be trusted outside of jail except to the extent that he is allowed to be in the courtroom. The jury may also draw the inference that the defendant is such a bad man that he will have his associates attempt to rescue him if he is permitted to go to any place other than the county jail and the courtroom. Possibly the jury will draw the inference that the defendant is a man of such ill repute that he would be lynched if he showed his face outside of the jail or the courtroom. Chief Justice Maxey drew all those inferences. He said in petitioner's case (*Commonwealth v. Darcy,* 362 Pa. 259, 276, 277):

> "There are hazards involved in taking a prisoner to the scene of his crime, which may be very distant from the courtroom. If his crime was of a particularly atrocious character, an attempt may be made to lynch him. There is also danger of the prisoner escaping or of members of his gang making an armed attempt to take him from custody. Why incur such risks for such futility?"

The answer to that is fewer views, not more invasions of constitutional rights. The fact that counsel was allowed

to attend the view makes no difference. It is the defendant rather than his counsel who is the interested party at a trial.

Petitioner contends that when the trial court, in the presence of the jury directed that he be locked up during the visit to the locus of the crime, petitioner's case was prejudiced in the eyes of the jury in a way calculated to make a fair trial impossible. The fact of the matter is that it would have been very easy to take petitioner to the view under guard. Surely the presumption of innocence becomes a farce when the presumed innocent is treated like an animal or a desperado. To do that is extremely unfair. Therefore it violates due process. *Adamson v. California,* 332 U. S. 46, 53.

Justice Cardozo wrote the opinion in *Snyder v. Massachusetts.* Petitioner respectfully asserts that analysis of the opinion reveals weakness in its reasoning from beginning to end and demonstrates the unsoundness of the result reached by the majority of this Court in that case. For that reason a detailed critique of the opinion follows:

At page 105, Justice Cardozo pointed out that Massachusetts could regulate its own procedure unless it offended some principle so rooted in the traditions and consciences of the people as to be ranked as fundamental. He assumed (pp. 105, 106) that the Fourteenth Amendment guaranteed (a) the right of confrontation; (b) the right of cross-examination; (c) the right of presence during the examination of jurors; and (d) the right of presence during the summing up of counsel. He said (p. 107) that in all those cases the presence of the defendant bears a reasonably substantial relation to his opportunity to defend. Petitioner is unable to see why these rights bear a more substantial relation to the opportunity to defend than the right to be present at a view. Petitioner denies that a prisoner would not be allowed to say anything to anybody except his counsel during a view. But even if a prisoner at a view must be silent, petitioner points out that it is the practice in our

courts for a defendant who has counsel to allow counsel to do the talking, except when the defendant is on the stand, so the mere fact that a defendant would remain silent during a view is of no consequence whatever.

Justice Cardozo said that there were three types of view. In the first type (108) the jury is simply shown the locus and nothing is said by anyone to the jury. The Fourteenth Amendment, said Justice Cardozo, did not guarantee presence at such a view, for the defendant if present would have to remain silent. Thus Justice Cardozo completely ignored one of the principal reasons for requiring the presence of the defendant throughout the proceedings in a trial, to wit, the obvious fairness and necessity of giving the man on trial an opportunity to observe the reactions of the jury so as to be better able to submit his case to such jury. Anyone experienced in the trial of cases knows the importance of this.

In the second type of view (110) counsel point out particular features of the scene to the jury. This, said Justice Cardozo, may be done in the absence of the defendant because this kind of a view differs only in degree from the first type of view and the first type of view may be conducted in the absence of the defendant. On this kind of reasoning the constitutional right to be present could be frittered away entirely. Justice Cardozo brushes aside as "an accident" the fact that a defendant could point out to his counsel that which he wanted his counsel to point out to the jury. At page 113 Justice Cardozo said:

> "The least a defendant must do, if he would annul the practice upon a view which the commonwealth has approved by the judgment of its courts, is to show that in the particular case in which the practice is exposed to challenge, there is a reasonable possibility that injustice has been done."

How in the world can a defendant know whether an injustice was done unless he was present at the view to

observe what took place? And how can he have the effective assistance of counsel unless he can consult with counsel regarding what should be pointed out to the jury? Counsel cannot assist a defendant effectively unless the defendant is afforded an adequate opportunity to keep counsel informed.

In the third type of view (113) the showers are persons other than counsel. Here, said Justice Cardozo, the same reasoning applies as in the first type of view. Petitioner contends the same criticism applies also.

The next step was to assert (113, 114) that a view is not part of the trial. Here it seems Justice Cardozo overlooked his statement at page 121 that in Massachusetts the chief purpose of a view "is to enable the jury to *understand better* the testimony". If that is true the view must be part of the trial. It is elementary that once jurors have been sworn they should decide the case before them only on the basis of their previous knowledge of human affairs plus what they learn during the trial. Jurors qua jurors must not be allowed to acquire from matters outside the trial an understanding of the evidence different from the understanding of the evidence that they would have had if such matters had not been permitted to intrude. Yet Justice Cardozo (like the trial judge in petitioner's case, see R. 880) says that the chief purpose of the view is to give the jury a "better" understanding of the testimony. By hypothesis this means that the chief purpose of the view is to give the jury an understanding of the testimony different from that which it would have had had there been no view. If this is so and the view *is not* part of the trial then it violates due process merely to have a view. If this is so and the view *is* part of the trial then it violates due process to conduct the view while agents of the commonwealth physically restrain the defendant from being present. Surely if the view is calculated to make the jurors understand the testimony differently from the way they would understand it merely from sitting in the courtroom and listening to it, a defendant who is restrained from

attending the view and is allowed to observe the jury only in the courtroom will miscalculate the impression which the testimony makes on the jury and thus will not be in a position properly to consult with his counsel regarding such important matters as how to cross-examine, what witnesses to put on the stand, whether to take the stand, and what to say in the speech to the jury. It was well put by the Mississippi court in *Foster v. State,* 70 Miss. 755, 765, 766, 767. Therefore, we are taking the liberty of presenting the following extensive quotation from that opinion:

> "Without attempting to elaborate our views on this point, we remark that the reported cases in which some courts of last resort have held that the prisoner was not entitled to be present at a view of the premises on which the offense was alleged to have been committed, for the reason that, in such inspection, the jury is not taking or receiving evidence in the absence of the accused, but is, during a suspension of the trial, and while absent and separated from the court, merely receiving impressions from silent, inanimate objects that will enable it better to comprehend and apply the testimony in the case, are inconsistent, and beg the question. They assume that the court is composed of the judge, the clerk, the sheriff, and overlook the great fact that the jury is the right arm of the court in the administration of law. They assert that the jury is not receiving evidence, because it is absent from the court, and cannot take testimony except in the presence of the judge and the accused, overlooking the painful fact that illegal evidence may be taken, and unlawful methods may be employed for its introduction. They declare that only impressions are received by the jurors on such inspections which will enable them to understand and apply the testimony offered. But this concedes the proposition in dispute. Impressions are made on the mind of jurors by dumb witnesses. They do have evidence of inanimate things. They are re-

ceiving impressions, evidence, enlightenment from voiceless things, call it by whatever name you will; and they are themselves being thus made silent witnesses for or against the accused. They return to the court-room with impressions, opinions, formed by an examination of dumb, inanimate witnesses, and, if erroneous impressions and opinions have been made and formed, their hurt is beyond all cure, for the jurors may not speak out what may weigh on their minds, but are become themselves dumb, passive witnesses. To say the jury cannot receive evidence by simply viewing the scene, is to insult common sense. The most convincing evidence is made by the sense of sight. The juror on the view *sees,* and thinks he knows what he thus *sees,* with all the conclusions flowing therefrom. He sees, or may see, more than a mere railway-car, or a naked room, or a piece of senseless earth; and, no matter what he *sees,* and *falsely sees,* he cannot speak, and have his mistaken conclusions corrected or removed. The impressions, the evidence made by the mute witnesses, may be more potent in fixing the jury's verdict than the living witnesses, speaking under oath to tell the truth.

Let us suppose an extreme case to illustrate the discussion—an illustration drawn from the case at bar. In the case at bar there is the evidence of two or three witnesses to the effect that there were mirrors on each side the car door, reflecting the interior of the car. Looking in these mirrors, these witnesses saw the accused coming down the car aisle in the direction of where the deceased sat. When near the deceased, he too saw the accused's reflection in the mirrors, and turned his head and threw his hand to his hip-pocket, and thereupon accused sprang back a step and fired. Now, suppose that, after the homicide, and before the view by the jury, for some reason the car has been overhauled and the mirrors removed. The jurors, we

will suppose, are ignorant of such removal. They are sent by the court to make an inspection, and they see, not only where the deceased sat, and the hole made by the bullet in the side of the car, but they see with astonished and indignant eyes that there are no mirrors. They naturally conclude the witnesses who testified as to what they saw in them have committed perjury, and all their testimony is unceremoniously thrust away as unworthy of examination or consideration. And the jurors, thus themselves converted into silent witnesses, have made up a case which could never have been fabricated, if the view had been had before the whole court and in the presence of the accused. We are only supposing a case to illustrate the proposition that the jury is receiving evidence on a view of the scene of the offense, and the illustration perfectly demonstrates the soundness of our view.

The constitutional right guaranteed to every person charged with crime to be confronted by the witnesses against him, will require the production of all evidence from all witnesses, animate and inanimate, in his presence. But not alone must all evidence be had in the presence of the accused, but it must likewise be had and taken in the presence of the court trying the case. The accused must be tried in court, before the court, and not before the jury sent out by the judge to gather evidence away from the court, and away from the accused. The statute undertakes to confer authority upon trial courts in criminal cases to dismember the court in the midst of, and on, the trial, and to send the jury out of the presence of the court, and, in the absence of the accused, to receive impressions and draw conclusions and form opinions by means of the evidence of inanimate witnesses. As a step in the progress of the trial, the judge remains in the court-room, sends the jury out to take this testimony, and the accused is forbidden to even know what the evidence so gathered is. A trial conducted, in part, away from the place

appointed for the holding of the court, in the absence of the judge and of the accused, is not that trial to which every man accused is constitutionally entitled. To the extent indicated. the law is unconstitutional."

To this petitioner adds that where, as in this case, the view is conducted before the taking of testimony, the testimony itself is bound to make a different imprint on the jurors' minds than it would had no view been held. For example, the mere words "Feasterville Tavern" would conjure up a particular vision in the mind's eye only of a juror who had been to that Tavern. This means that the trial judge was not wasting words when he said that the purpose of the view was to change the jury's understanding of the testimony.

At page 116, Justice Cardozo said that there are some constitutional rights to which his doctrine of harmless error did not apply. He cited the right of a defendant to be heard in his own defense. At page 111 Justice Cardozo had said "The Fourteenth Amendment has not displaced the procedure of the ages". Reading what he said at page 116 together with what he said at page 111, his confusion is apparent. The right to take the stand is comparatively new. It was the procedure of the ages not to allow a prisoner to be heard in his own defense. If the right to take the stand and testify in one's own defense is guaranteed by the Fourteenth Amendment then Justice Cardozo is wrong and the Fourteenth Amendment has displaced the procedure of the ages to the extent that such procedure violated fundamental rights. See *In re Oliver*, 333 U. S. 257, 275.

At page 117 (see footnote 2) Justice Cardozo bolstered his harmless error argument by citing *Commonwealth v. Kelly*, 292 Pa. 418, in which it was held not reversible error for the trial judge to have communicated instructions to the jury in the absence of the defendant and his counsel. *Commonwealth v. Kelly* is not followed by this Court. See *Shields v. United States*, 273 U. S. 583; *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76.

Three other parts of the opinion require criticism.

At page 112, Justice Cardozo quoted with approval from *People v. Bonney*, 19 Cal. 426, 446, as follows:

> "We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations or conclusions of the jury."

As petitioner has already pointed out, reasoning such as that of the California court will result in defendant having a right to be present only during such time as he is on the witness stand.

At page 115 Justice Cardozo said:

> "What is here for revision is the action of the judicial department of a state excluding the defendant in a particular set of circumstances, and the justice or injustice of that exclusion must be determined in the light of the whole record."

Petitioner asks how he can be expected to "make" a proper record if he is locked up in jail and prevented from attending part of the proceedings. To make the securities of the Constitution depend upon such quiddities is to cheapen and degrade them.

A vigorous dissent was written by Justice Roberts and concurred in by Justice Brandeis, Justice Sutherland and Justice Butler. They found (127) that there was "no doubt as to the proper resolution of the issue".

The dissenting opinion contains no "reasonable man" test for frittering away constitutional rights. In plain language it says (128, 129) that the right to be present at the trial is of the very essence of due process and the word "trial" comprehends the inquiry by the ordained trier of fact from beginning to end. At page 132 of the dissenting opinion it is pointed out that closing the door to the right to be present at a view might result in closing all doors behind it. The opinion said (132):

> "But documents, plans, maps, photographs, the clothing worn by the victim and by the perpetrator of the alleged crime, the weapon used, and other material objects may be more potent than word of mouth, to carry conviction to the jury's minds; and, so of the physical appearance of the scene of the crime. No reason is apparent why, if the accused may be excluded from a view, he may not also be excluded from the court room while such documentary and physical evidence is proffered to and examined by the jury."

At page 134 the dissenting opinion laid to rest the notion that a view is not part of the trial. The opinion said:

> "If, then, a view of the premises where crime is alleged to have been committed is a part of the process of submission of data to the triers of fact, upon which judgment is to be founded; if the knowledge thereby gained is to play its part with oral testimony and written evidence in striking the balance between the state and the prisoner, it is a part of the trial. If this is true the Constitution secures the accused's presence."

The dissenting Justices had an understanding of the doctrine of harmless error. At pages 136, 137, the opinion cited *Patton v. United States,* 281 U. S. 276, and said:

> "But if it were clear that the verdict was not affected by knowledge gained on the view or that the result would have been the same had the appellant been present, still the denial of his constitutional right ought not be condoned. Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused, is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him."

Petitioner contends that the dissenting Justices' conception of the doctrine of harmless error is correct. Constitutional rights are substantial and the invasion of substantial rights is harmful in itself. Imprisonment has probably done some good for some people at some times. But no one would contend that a man falsely imprisoned must prove that his confinement is harmful to him. That which is true of the right to be free from imprisonment is true of the right to be free in the enjoyment of constitutional rights for constitutional rights are in themselves substantial. That is the view of the harmless error statute (28 U. S. C. A. 391) and Rule 52 of the Rules of Criminal Procedure, and that is the view which has been adopted by this Court at least five times since *Snyder v. Massachusetts.* See *Kotteakos v. United States,* 328 U. S. 750, 764, 765; *Bihn v. Baker,* 328 U. S. 633, 638; *Glasser v. United States,* 315 U. S. 60, 76; *McCandless v. United States,* 298 U. S. 342, 347, 348; *Bruno v. United States,* 308 U. S. 287, 293, 294; *Williams v. Great Southern Lumber Company,* 277 U. S. 19, 26. In footnote 19 at p. 765 of the opinion in *Kotteakos v. United States,* this Court cited with apparent approval the dissenting opinion in *United States v. Mitchell,* 137 F. 2d 1006, 1012, 2 Cir., in which Judge Frank stated that constitutional rights do not give way to the vague concept of harmless error. In the light of all those cases *Snyder v. Massachusetts* is no longer the law.

An analysis of pertinent decisions of this Court which preceded *Snyder v. Massachusetts,* 291 U. S. 97, is necessary in order to underscore the error which the majority of the Court fell into in that case.

The cases are *Hopt v. Utah,* 110 U. S. 574, 579; *Lewis v. United States,* 146 U. S. 370, 372, 373; *Howard v. Kentucky,* 200 U. S. 164; *Dowdell v. United States,* 221 U. S. 331; *Diaz v. United States,* 223 U. S. 422; *Frank v. Mangum,* 237 U. S. 309; *Valdez v. United States,* 244 U. S. 432; *Fillippon v. Albion Vein Slate Co.,* 250 U. S. 76; *Shields v. United States,* 273 U. S. 583; and *Gaines v. Washington,* 277 U. S. 81, 87.

In *Hopt v. Utah,* 110 U. S. 574 and *Lewis v. United States,* 146 U. S. 370, challenging of members of the jury panel had taken place in the absence of the prisoner. In neither case had counsel objected. In neither case was there anything to indicate that the absence of the prisoner had affected the result of the trial. In both cases this Court reversed. In *Hopt v. Utah,* which had come before the Court on writ of error to the Supreme Court of the Territory of Utah, this Court expressly said (579) that due process had been violated; and in *Dowdell v. United States,* 221 U. S. 325, 331, this Court expressly stated that that had been what the Court *held* in *Hopt v. Utah.* In *Lewis v. United States,* 146 U. S. 370 the Court said (375, 376) that a substantial right of the accused had been violated. In the *Hopt* case this Court also specifically held that it was not within the power of counsel or the prisoner to waive the prisoner's right to be present.

In *Howard v. Kentucky,* 200 U. S. 164, the trial court had discharged a juror for cause *before he was sworn* after questioning him in the absence of the prisoner and his counsel. This Court held that due process had not been violated. The Court's opinion did not refer to *Hopt v. Utah,* 110 U. S. 574 or *Lewis v. United States,* 146 U. S. 370. The Court pointed out that the right to challenge is the right to reject, not to select, a juror (174). From the opinion of the Court it does not appear that the place of the challenged juror was filled in the absence of the prisoner. Since the challenged juror took no part in the proceedings against Howard but was merely eliminated from such proceedings just as members of a jury panel are often excused at the beginning of a term, it seems to petitioner that the decision in *Howard v. Kentucky,* 200 U. S. 164 is clearly distinguishable from petitioner's case in which not only the trial judge but also other persons composing the court which *tried* petitioner proceeded to view the locus in petitioner's absence after the jury had been sworn.

Diaz v. United States, 223 U. S. 422, is one of the many cases which hold that where a defendant who is at liberty on bail *voluntarily* chooses to absent himself from part of the trial the trial may proceed in his absence. Such a situation is sharply distinguishable from cases like petitioner's case where agents of the government physically restrain the prisoner from attending the trial. See *Ex parte Terry,* 128 U. S. 289.

In *Frank v. Mangum,* 237 U. S. 309, the prisoner had not been present when the verdict was rendered, his presence having been waived by counsel without his knowledge or consent upon the trial court's having suggested that the presence of an angry mob made it physically unsafe for the prisoner to come into court. Not until after the Supreme Court of Georgia had refused him a new trial did Frank move to set aside the verdict as a nullity because he had been absent when it was rendered. The Georgia Supreme Court held that Frank could not make a motion on such grounds at that late stage of the proceedings. This Court held that due process had not been violated and distinguished, *Hopt v. Utah,* 110 U. S. 574 as constituting authority only for the proposition that the territorial code of criminal procedure had been violated, an interpretation of that case with which petitioner does not agree. See *Dowdell v. United States,* 225 U. S. 325, 331. This Court limited *Lewis v. United States,* 146 U. S. 370 to its own facts and dismissed it as holding only that a prisoner in a federal court had a common law right to be present.

In *Gaines v. Washington,* 277 U. S. 81, 87, this Court cited *Frank v. Mangum,* 237 U. S. 309 for the narrow proposition that the absence of a prisoner at part of the trial cannot be raised for the first time after a State Supreme Court has affirmed a conviction.

Valdez v. United States, 244 U. S. 432, considered a provision of the Philippine Code which conferred the privilege of confrontation and held that a *judge* might view the scene of the crime with the consent of the defense counsel although without the knowledge of the defendant.

Fillippon v. Albion Vein Slate Co., 250 U. S. 76, came before this Court on certiorari to the Circuit Court of Appeals for the Third Circuit. In response to an inquiry from the jury the trial court in the absence of the parties and their counsel had sent the jury a supplementary written instruction on a question of contributory negligence. The instruction had been erroneous. This Court reversed holding that the *orderly conduct of a trial by jury, essential to the proper protection of the right to be heard,* entitles the parties to be present at all proceedings from the time the jury is impanelled until its discharge after rendering the verdict.

Shields v. United States, 273 U. S. 583, also came before this Court on petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit. The district attorney and counsel for defendants had requested the court that the jury be held in deliberation until they should agree upon a verdict. Subsequently and without the presence of the defendants or their counsel, the court received a verdict announcing the jury's findings of agreement as to some defendants and disagreement as to other defendants. The court then returned a written instruction that the jury also find guilty or not guilty those defendants as to whom the jury had disagreed. Shields contended that the action of the court in thus communicating with the jury in his absence had denied him due process of law. This Court reversed. Chief Justice Taft wrote the opinion and did not place the decision on constitutional ground. Instead, the Chief Justice said that the trial court should not have made an exception to the rule of *orderly conduct of a jury trial* entitling the defendant, especially in a criminal case, to be present from the time the jury is impanelled until its discharge (588, 589). Nothing in the case suggested that the verdict had been affected by the trial court's supplementary instruction.

The Court in *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76 and *Shields v. United States,* 273 U. S. 583, did not

reach constitutional ground. But petitioner contends that under the rule of those cases a proceeding in a trial court in which the prisoner is not present at every moment from the time the jury is impanelled until after its discharge is a proceeding which has not been conducted in the orderly manner essential to the protection of the right to be heard. It seems to petitioner that to conduct a capital case in a manner other than orderly does not accord with due process of law. Order, after all, is of the very essence of law, and due process is "ordered liberty". *Wolf v. Colorado,* — U. S. —, 93 L. ed. 1356, 1358; *Palko v. Connecticut,* 302 U. S. 319, 325. The doctrine of harmless error has nothing to do with this. The denial to a prisoner of a constitutional right is prejudicial without more. This is especially so where *as in your petitioner's case* the record is silent and there is no way of telling how badly things were conducted in his absence. See the interesting discussion of District Judge Pollock in *Fina v. United States,* 46 F. 2d 643, 644 (10 Cir., 1931). See also *Johnson v. Zerbst,* 304 U. S. 458, 467, 468 which is by analogy authority for the proposition that a court loses jurisdiction when it tries a man in his absence.

Under the foregoing authorities petitioner respectfully contends that *Snyder v. Massachusetts,* 291 U. S. 97, must be wrong and should be discarded.

III. Petitioner's Case Is Different from Snyder v. Massachusetts, 291 U. S. 97.

Snyder v. Massachusetts, 291 U. S. 97, involved a problem rather similar to that in petitioner's case. That is why petitioner has devoted much of this brief to a frontal attack upon *Snyder v. Massachusetts.* However, petitioner believes that even if *Snyder v. Massachusetts* was correctly decided there are differences between petitioner's case and that case, and these differences ar so great that an appeal should be allowed and the decision of the Supreme Court of Pennsylvania should be reversed. Fur-

thermore, some of the things which this Court said in its opinion in *Snyder v. Massachusetts* indicate that that case actually constitutes authority for a reversal in petitioner's case.

(a) *No stenographer was present at the view.*

No stenographic transcript was taken of what took place when the jury was in the Feasterville Tavern together with three witnesses for the prosecution. The Stipulation does not fill the gap for the Stipulation, like any stipulation, does not purport to give a complete account of what took place at the view. The Stipulation merely lists things within the *common* recollection of the district attorney and trial counsel for petitioner. Other things may or may not have taken place at the view. Furthermore, it must be remembered that the Stipulation had no part in the trial. It was not entered into until after petitioner had been sentenced to death and his appeal was about to be argued in the Supreme Court of Pennsylvania. Also, petitioner submits that if trial counsel cannot waive a prisoner's constitutional right to be present (*Hopt v. Utah,* 110 U. S. 574; *Lewis v. United States,* 146 U. S. 370) trial counsel certainly cannot bind his client by a stipulation with regard to what took place in his client's enforced absence. This is particularly true where trial counsel attended the viewing by order of the court (R. 272, 273). Surely petitioner is not bound by the involuntary actions of his counsel.

Even under the authority of *Snyder v. Massachusetts,* the fact that no transcript was taken of what took place at the view means that due process was violated. This is so because in *Snyder v. Massachusetts,* 291 U. S. 97, the Court said at pp. 112, 113:

> "When the scene is explained by showers who are not the counsel for the parties, a defendant gains nothing by being present at a view any more than he gains where there is only a bare inspection without an explanatory word. He has no privilege in such circum-

stances, and certainly no constitutional privilege, to speak to the showers and give suggestions or advice. 'We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations or conclusions of the jury.' People v. Bonney, 19 Cal. 426, 446. If they fail to point out anything material, he may prove the fact upon the trial and ask for another view. He had the same privilege here, for there was a stenographic transcript of all that was said and done. Never, at any stage of the proceeding, has there been a suggestion by the defendant or his counsel that there was need of something more."

By implication this means that to conduct a view in the absence of the defendant violates due process unless the trial court, by the taking of a stenographic transcript, safeguards the defendant's right to ascertain what was pointed out at the view and the defendant's privilege to prove at the trial material facts which he finds to have been overlooked at the view. Certainly the failure to transcribe what took place at the view affected the "fulness" of petitioner's opportunity to defend against the charge. The word "charge" must be interpreted broadly. It includes more than just the averments of the indictment. It includes the evidence, the summing up of counsel, the trial court's instructions to the jury, and such things as the view. And where a defendant's absence has a reasonably substantial relation to the fulness of his opportunity to defend against the charge, *Snyder v. Massachusetts* (pp. 105, 106) says that due process has been violated. Furthermore, at p. 115 of *Snyder v. Massachusetts,* Justice Cardozo said that whether or not due process has been violated "must be determined in the light of the *whole* record". Petitioner submits that that cannot be done in his case. No stenographer was present at the view. Therefore the record is not "whole". The inability to determine that due

process was respected is itself indicative of a violation of due process.

(b) *Prosecution Witnesses Were Present at the View.*

Paragraph 3 of the Stipulation (page 2 of the Supplemental Record) says that three eyewitnesses for the prosecution were present at the view. This important fact is discussed at length elsewhere in this brief (Section IV (a) *infra*). It makes petitioner's case very different from *Snyder v. Massachusetts*. It increases the risk of prejudice to the defendant by putting the jury in the company of his adversaries while he is forced to be absent.

(c) *The Stipulation Says That the Jury Was Informed of "The Change in Location of the Main Entrance to the Barroom from a Side Wall to the Front Wall of the Building".*

A similar thing was done in *Snyder v. Massachusetts* and this Court pointed out that although that made the action of the Massachusetts court wrong it was up to the defendant to have objected after having scanned the minutes of the proceedings. The Court also pointed out that in *Snyder v. Massachusetts* the change had subsequently been stipulated to in court. See p. 118 of *Snyder v. Massachusetts*, 291 U. S. 97. Surely this means that due process was violated in petitioner's case for no minutes of the proceedings in the tavern were taken and even the Stipulation was not entered into until after petitioner had been sentenced to death.

(d) *The Record Does Not Indicate That Petitioner Would Have Been Allowed to Visit the Tavern Afterwards.*

At pages 108, 109 of *Snyder v. Massachusetts*, 291 U. S. 97, this Court said:

> "Indeed the record makes it clear that upon request he would have been allowed to go there after-

wards in company with his counsel. Opportunity was ample to learn whatever there was need to know."

No part of the record of petitioner's case even implies that petitioner would have been allowed upon request to visit the tavern.

(e) *Petitioner Did Not Take the Stand and Admit That He Was at the Tavern at the Time of the Crime.*

At page 109 of *Snyder v. Massachusetts,* 291 U. S. 97, this Court said:

> "The defendant took the stand and admitted that he was at the gasoline station at the time of the crime."

Petitioner did not take the stand, nor did he admit anything. His plea of Not Guilty placed all the averments of the indictment in issue.

At page 115 of *Snyder v. Massachusetts,* 291 U. S. 97, this Court said:

> "Nor is there need for us to hold that conditions can never arise in which justice will be outraged if there is a view in the defendant's absence."

Petitioner asserts that the absence of a stenographer at the view makes his case so different from *Snyder v. Massachusetts* that justice was outraged in petitioner's case. Petitioner also invites the attention of this Court to the fact that the Massachusetts court in *Commonwealth v. Snyder,* 282 Mass. 401, 414, held that the view was *not* part of the trial. The opinion in *Commonwealth v. Darcy,* 362 Pa. 259, 267, says that it does not make any difference whether the view is or is not part of the trial. This means that Pennsylvania has held that a man may be tried during his enforced absence. Surely that violates due process. Indeed, Pennsylvania had to make such a decision in order to affirm petitioner's conviction, for the trial was not adjourned when the jury was taken to the tavern (R. 273, 274).

One more distinction between petitioner's case and *Snyder v. Massachusetts,* must be pointed out. *Snyder v. Massachusetts* was decided in 1934. Since that time the dangers inherent in allowing the rights of man to be frittered away have become overwhelmingly clear. Since that time the real nature of the Fascist and Nazi regimes has become certain. Since that time the Popular Front days have ended and it has been demonstrated that even left-wing autocracy must end in slavery. Today we all know that to condone a single invasion of a fundamental right leads at first to further invasion and eventually to the denial of the right itself. For this reason petitioner asks this Court to reverse the decision of the Supreme Court of Pennsylvania even if this Court feels that that which was done to petitioner might have been all right in the light of what was known in the year 1934. See *In re Oliver,* 333 U. S. 271 at p. 281.

IV. It Is Not Clear That the View Did Not Affect the Verdict.

If a stenographer had been present while the jury was in the tavern, petitioner might know what went on there. But no stenographer was present and for that reason this portion of the brief is difficult to write. Petitioner has been deprived of the opportunity to have the proceedings against him put down in black and white so that this Court can determine whether or not his constitutional rights have been violated. Under such circumstances all that the writer of this brief can do is demonstrate that what went on at the view may well have affected the verdict, especially the verdict as to penalty. Throughout the discussion which follows an effort will be made to emphasize the fact that the record does not make it clear whether or not petitioner shot his gun at anybody inside the tavern, although it indicates that he probably did not. If the jury found that he did shoot at someone, that may well have made the jury decide to fix the death penalty. Nobody knows what the jury

did find. The record does not make it absolutely clear whether petitioner merely fired into the floor in an effort to quiet resistance by a display of force or whether he shot someone. The difference is as immense as the difference between dropping a bomb on a desert or on a Hiroshima. Facts affecting the answer to the question should not have been given to the jury in the enforced absence of the defendant.

(a) *Prosecution Eyewitnesses Were Present.*

Paragraph 3 of the Stipulation (page 2 of the Supplemental Record)says that when the jury viewed the Feasterville Tavern there were present John R. Naysmith, Florence Naysmith and James Brown. John R. Naysmith was the proprietor of the tavern. Florence was his wife. James Brown was the owner of the premises. All three claim to have been eye witnesses to the hold-up.

Petitioner contends that after having seen those three eye witnesses in the tavern the jury may have associated them with the crime more emphatically than the jury might otherwise have done. Therefore the jury may have allowed greater weight to their testimony. Furthermore, no stenographer having been present at the view, it is not clear that none of the eye witnesses talked within the hearing of the jury inside the tavern. Indeed, at least one of them probably did talk, for the Stipulation says (paragraph 4 (b)) that the change in location of a main entrance to the bar room from the sidewall to the front wall of the building was pointed out to the jury. Petitioner believes it to be undisputed that the court officers, trial counsel, the district attorney, and the trial judge had never been in the tavern before the viewing. Therefore it is doubtful that any of them pointed out the "change" to the jury and likely that the proprietor or his wife or the owner of the premises did so.

It is the law of Pennsylvania that in fixing the penalty for murder of the first degree the jury is to consider *all*

of the facts and circumstances of the case. *Commonwealth v. Brown,* 309 Pa. 515, 527. From the few facts recited in the Stipulation regarding the viewing it seems that the jury during the viewing may have drawn inferences important in the fixing of the penalty.

Certainly an important circumstance in determining the penalty is the manner in which petitioner used his gun if he used it at all.

Petitioner was tried for the murder of Kelly who died outside the Tavern. But two other men, Allen Hellerman and Edward Wunsch had been wounded by gunfire inside the Tavern. A preponderance of the ballistics and other testimony (see 452, 659, 762, 790) indicates that it was Zietz who shot them both. But the jury may have decided that it was Darcy. Whether it was or was not is certainly a matter bearing on the penalty. The testimony of John R. Naysmith, *one of the eye witnesses who was in the Tavern,* when the viewing was conducted, was that after Hellerman and Wunsch had been shot petitioner said (304) "I feel like shooting somebody else". A permissible inference from this is that petitioner had shot Hellerman, Wunsch, or both of them. If the jury drew that inference it may have led the jury to fix the death penalty. *The chances of the jury drawing that inference may have been increased by the fact that the jury having actually seen John R. Naysmith in the Tavern may have given particular weight to his testimony.*

This possibility was not eliminated by any other testimony at the trial for although the bullet which hit Hellerman was identified by ballistics testimony as having been fired by the gun of Zietz (762, 790), the bullets which hit Wunsch were not identified.

If petitioner shot someone that fact certainly had a bearing on the penalty. If the jury believed John R. Naysmith, then the jury believed that petitioner did shoot someone. *The chances of the jury's believing John R. Naysmith were increased by the fact that they actually saw him in the*

Tavern before they heard him testify. Naysmith was part of the clubby little group which was allowed to attend the judicial procedure known as a view, petitioner was just an animal who could not be trusted outside of his cage.

Similarly, and aside from the question of whether petitioner shot any one, the jurors' minds may have been influenced toward fixing the death penalty if the jury believed that it was petitioner who fired the shots into the telephone before leaving the Tavern. In this regard it is important to note that *two of the prosecution's eye witnesses who were present in the Tavern at the time the jury viewed the Tavern* say that it was petitioner who fired the shots into the telephone. See the testimony of John R. Naysmith (325) and James Brown (380). Mrs. Naysmith, the third witness present during the view, did not know whether it had been petitioner or Foster (350).

The ballistics testimony indicates that it was Foster (761, 789) but the ballistics testimony may not have prevailed on that point in the jurors' minds, impressed as they must have been by the testimony of witnesses who had been part of the group at the view.

(b) *By Not Being Present at the View Petitioner Lost His Chance to Have the Jury Shown Holes in the Floor Which Would Indicate That He Had Fired Into the Floor.*

From the foregoing discussion of the testimony it is clear that petitioner may have fired at someone but that on the other hand he may merely have fired into the floor as persons sometimes do in order to scare people whom they do not intend to injure. The death penalty may well have depended on whether petitioner had merely fired into the floor in order to scare people or had shot at someone.

If he fired into the floor there may have still been holes in the floor at the time the jury viewed the premises. If there were holes in the floor, petitioner, by being present,

could have directed the attention of his counsel to the holes in the floor and counsel could then have seen to it that such holes were pointed out to the jury. Counsel could hardly do this in the absence of petitioner since, as has been already stated, counsel had never been in the Tavern before the time of the viewing. This is not affected by the testimony of Keith R. Dane to the effect that he had not seen any holes in the bar room floor (767, 768), for Dane may have been mistaken.

(c) *Changes in the Premises were Described to the Jury During the View.*

Paragraph 4 (b) of the Stipulation (page 4 of the Supplemental Record) says that the attention of the jury was directed to "The change in location of the main entrance to the barroom from a side wall to the front wall of the building."

From the record it is not clear that this change was not important. It may have affected the visibility and therefore the credibility of some of the eye witnesses. A change in the location of an entrance cannot simply be pointed out. The pointing out necessarily must be coupled with some statement such as "There is where the entrance was and here is where it is now." Such a statement is testimony and even *Snyder v. Massachusetts,* 291 U. S. 97, is authority that such a statement should not be taken in the absence not only of the defendant but also of a court stenographer. See page 118 of *Snyder v. Massachusuetts,* 291 U. S. 97.

V. The View Violated Petitioner's Right to a Public Trial.

(a) *The Public Was Excluded.*

Pages 272, 273 of the record shows that provision for attendance at the view was made only for two tipstaves, the jury, the judge, the district attorney, the assistant dis-

trict attorney, the sheriff and trial counsel for petitioner. Inclusio unius est exclusio alterius. To include enumerated persons was to exclude the public. Nothing in the record indicates that the public was even notified that there was to be a view or where and when it was to be held in advance of the court's action in ordering that the view be held forthwith. Not even the friends and relatives of petitioner were told. In other words members of petitioner's family and other members of the public who had arranged transportation to the courtroom had no chance to arrange to get to the Tavern some twenty miles away. Petitioner submits that to hold court in an out of the way place without advance notice to the public cuts off the public's opportunity to be present. Even though trial counsel for petitioner was permitted to go along while the court officers, the jury, the judge, etc., rambled around the countryside, it is clear that material bearing on petitioner's guilt or innocence was submitted to the jury while he was locked up like an animal and denied the right even to have his family and his friends keep an eye on things.

(b) *This Violated Due Process.*

In re Oliver, 333 U. S. 271, 272, says that at the very least a defendant is entitled to have his friends and relatives see and hear what goes on. This was not done in petitioner's case and therefore due process was violated just as it was violated in Oliver's case. See *Gaines v. Washington,* 277 U. S. 81, 85.

The right to have the public present is not a shadowy right. It has substance. The public has a right to know what is going on. And the defendant has a right that there be constantly present that restraint which the watchful eye of the public imposes on judges and prosecutors. Furthermore, as the Court said in *State v. Keeler,* 52 Mont. 205, 156 P. 1080, a public trial is necessary in order to provide defendant with a supply of witnesses as to what took place at his trial so that he can prove irregularities if any irreg-

ularities occur. Petitioner had no such chance. To be denied the chance was particularly prejudicial since no stenographer attended the view and therefore petitioner never had an opportunity to determine what had been done during the view.

The fact that the public was present during that portion of the trial which took place in the courtroom does not cure the defect. See *United States v. Kobli*, 172 F. 2d 919, in which the Court of Appeals for the Third Circuit reversed a conviction on the ground that a public trial had been denied. In that case the record did not indicate that the public had been excluded at any time except during the selection of the jury. See also by analogy *Powell v. Alabama*, 287 U. S. 45, which holds that the right to counsel extends to every stage of the proceedings. Petitioner submits that the right to a public trial is coextensive and that that right was denied him in this case.

VI. Conducting the View Over the Objection of Petitioner Violated Due Process.

(a) *At Common Law a View Could Not Be Conducted Without the Consent of the Defendant.*

After the jury had been sworn (R. 270, 271) the district attorney moved that the court grant permission to the jury to visit the Feasterville Tavern, the scene of the alleged offense. Trial counsel for petitioner objected on the ground that such action would be "prejudicial to the defendant". The objection was overruled and an exception was granted. Petitioner emphasizes the fact that he objected to having a view at all. It shows that he certainly objected to the view being conducted while he was locked up in jail like an animal.

The common law has always recognized that although other affairs may be conducted in barrooms or bedrooms, trials take place in courtrooms. The difference is substan-

tial. Courtrooms are well adapted to those artificial proceedings which we call a trial and barrooms are not.

Even *Snyder v. Massachusetts*, 291 U. S. 97, says (p. 105) that it violates due process to deprive the defendant of "an adequate opportunity to be heard in defense of" the charge against him.

In *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, this Court held that the orderly conduct of a trial by jury is essential to the proper protection of the right to be heard. See *Shields v. United States*, 273 U. S. 583, 588, 589. If the orderly conduct of a trial by jury is essential to the proper protection of the right to be heard (*Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76) and if an adequate opportunity to be heard is essential to due process (*Snyder v. Massachusetts*, 291 U. S. 97) then trials should take place in courtrooms where order can be assured. (See also *Wolf v. Colorado*, U. S. , 93 L. Ed. 1356, 1358; *Palko v. Connecticut*, 302 U. S. 319, 325, holding that due process is "ordered liberty".) In courtrooms the jury is placed in a "box" designed to minimize infection by improper influence and maximize good hearing; in barrooms something less is likely. There are other differences. In courtrooms the judge is placed in a position of apparent impartiality. Who knows on what side he may appear to be when he comes down from the bench, doffs his robes, enters other premises and takes his stand where he sees fit? In courtrooms a special part of the room is reserved for the public; in barrooms this is impossible and they are likely to mingle with the jury. Parenthetically, petitioner respectfully recalls the attention of the Court to the fact that he argued in Section V of this brief that no provision was made for the public to attend the viewing and therefore he was deprived of his right to a public trial regardless of whether or not a few members of the public were at the Tavern.

Petitioner feels that he cannot emphasize too strongly his contention that the court and jury should not ramble around the countryside in automobiles or busses, visiting

taprooms, while the trial is in progress. And the record makes it clear that the trial was in progress during the view, for the court did not adjourn for the purpose of conducting the view. Compare page 273 of the record which includes the stenographer's notes of what happened just before the view with page 274 of the record which shows that court did adjourn *after* the view. Regardless of whether all views are part of the trials in which they are conducted, the view in petitioner's case must have been part of the trial for the trial had not been adjourned.

Eighteenth Century English common law recognized the right of the defendant to be tried only in court. As Justice Cardozo pointed out in *Snyder v. Massachusetts,* 291 U. S. 97, views could not be conducted without the consent of both parties. A man's day in court meant a day in court, not a day spent by court and jury in a barroom or some other unsuitable place where nobody knows how disorderly things may be.

Mr. Chitty says that it took a statute to give the court the *power* to grant a view without the consent of both parties. See *Chitty's Criminal Law,* Third American Edition (1836) at page 483; *Rex v. Redman,* 1 Kenyon 384. Justice Cardozo says that the statute (6 Geo. IV chap. 50 sec. 23) supplied "the defect of power, if defect there formerly had been" (p. 111 of *Snyder v. Massachusetts,* 291 U. S. 97). The fact that nearly all the states, but not Pennsylvania, have given their courts the power by statute indicates that Mr. Chitty is correct and that in the absence of such a statute a court is powerless to order a view without the consent of the defendant.

Snyder v. Massachusetts, 291 U. S. 97, holds that the statute which Massachusetts passed to give its courts power to order views regardless of the consent of the parties did not violate due process.

Therefore the door might be closed against petitioner if Pennsylvania had a statute similar to the Massachusetts statute and the statutes passed in other states or if the

Act of 6 Geo. IV. chap. 50, sec. 23, were in force in Pennsylvania.

But Pennsylvania has no such statute and the Act of 6 Geo. IV. chap 50, sec. 23, was enacted in 1825, one hundred and forty-four years after William Penn had brought with him to America the common law of England as it existed at the time he came. His Charter from Charles II. provided:

> "That the Lawes . . . as to felonies, *shall be and continue the same as they shall bee for the time being,* by the general course of the Law in our Kingdome of England, until the said Lawes shall be altered by the said William Penn, his heires or assignes, and by the freemen of the said Province, their Delegates or Deputies, or the greater part of them."

[See *Charter to William Penn and Laws of the Province of Pennsylvania,* passed between the years 1682 and 1700 at page 84 (Commonwealth of Pennsylvania, 1879); *Morris's Lessee v. Vanderen,* 1 Dallas 64, 67]. And the First Legislature of Pennsylvania provided by a statute of January 28, 1777 for the continuation of so much of ". . . the common law and such of the statute laws of England, as have heretofore been in force. . . ."

The fact that 6 Geo. IV. chap. 50, sec. 23 has never been in force in Pennsylvania is made clear by the Report of the Judges in 3 Binney 595 which lists the English statutes which are in force in Pennsylvania but does not list 6 Geo. IV.

Petitioner believes that except for his case the Pennsylvania reports contain no case in which a view was permitted against the specific objection of the defendant.

(b) *At Least in the Absence of a Statute it Violated Due Process to Conduct the View Over the Objection of Defendant.*

Petitioner has already adverted to the fact that due process and the right to be heard require that a trial

proceed in an orderly manner and the fact that it is not orderly to have the judge and the jurors stray around the countryside visiting taverns while the trial is in progress. The violation of due process is made all the more clear when we consider the fact that any subject of the Crown on trial in bloody England at the time of the American Revolution had an absolute right that no view be conducted without his consent. We need not discuss whether the Fourteenth Amendment carries with it Amendments 1 to 8 or any of them. It has been recognized as a minimum standard of due process that Americans possess nothing less than the rights possessed in England by the subjects of King George. *Murray v. Hoboken Co.*, 18 Howard 272, 277; *Lowe v. Kansas*, 163 U. S. 81, 85; *Powell v. Alabama*, 287 U. S. 45, 65. As we have already pointed out Englishmen had a right that in the absence of an Act of Parliament no view should be conducted without the consent of both parties. Petitioner contends that he has a similar right and that no view can be conducted over the objection of a defendant at least until the General Assembly, which is Pennsylvania's equivalent to Parliament, passes a statute to give the court the power. The right that no view be conducted without the consent of the defendant may perhaps be the kind of a right the people themselves can take away through their legislature. But petitioner denies that a court can constitutionally take away this right and arrogate unto itself the power to do that which the common law said no court had power to do.

Twining v. New Jersey, 211 U. S. 78, says at page 101 that the people do not have to amend their constitution every time they want to change a procedure settled in English law. And if *Snyder v. Massachusetts*, 291 U. S. 97, is the law petitioner concedes the possibility that the right of a defendant not to have a view conducted without his consent may be taken away by statute. That is not surprising. Englishmen possessed no inalienable right that

views not be conducted without their consent. The existence and continued application of 6 Geo. IV. clearly shows that what Englishmen had and undoubtedly have to this very day is a right that no views be conducted without their consent in the absence of an Act of Parliament. Petitioner claims the same right.

Viewed in this way a certain harmony can be established between *Murray v. Hoboken Co.* and the cases which start with *Twining v. New Jersey.* In accordance with this harmonious scheme the law is not to be administered in a straight-jacket. Although certain rights are so fundamental that even the legislature cannot take them away, other rights are subject to legislative modification by the people but not to arbitrary change by the courts.

All concur with Chief Justice Hughes who said, in *Brown v. Mississippi,* 297 U. S. 278, 285, that "the freedom of the State in establishing its policy is freedom of constitutional government". But petitioner contends that great changes in the law of a constitutional government must be made by the legislature. Common law lives. Common law can be superseded by statute. Common law can be molded by courts. But constitutional courts cannot pull on their own bootstraps and confer upon themselves at the expense of a citizen a power which was denied even to the courts of Eighteenth Century England.

Petitioner recognizes that Pennsylvania is the final authority as to what constitutes the law of Pennsylvania. Although no case says so petitioner might concede arguendo that the Supreme Court of Pennsylvania has, by the decision in this case, sought to confer upon Pennsylvania courts the power over the objections of defendants to hold trials in barrooms and take juries there without even adjourning court. But petitioner contends that the action of Pennsylvania judges in attempting to confer this power upon themselves at the expense of citizens who consistently have refrained from conferring the power upon their courts by appropriate legislation is unconstitutional.

The cases, especially those cited by Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. 97, support the theory that some of the rights of Eighteenth Century Englishmen can be taken away by statute. See *Hurtado v. California*, 110 U. S. 516; *Gaines v. Washington*, 277 U. S. 81; *Walker v. Sauvinet*, 92 U. S. 90; *Maxwell v. Dowe*, 176 U. S. 581; *Twining v. New Jersey*, 211 U. S. 78; *Palko v. Connecticut*, 302 U. S. 319; *Holden v. Hardy*, 169 U. S. 387.

But no case holds that a *court* can add to its own power by taking away from a man on trial for his life an important right which the common law gives that man. To allow a court to do so would be to say that a court can pull itself up by its own bootstraps. It would be rather like saying that Congress could pass a statute conferring upon itself powers which constitutional legislative bodies have never had. Petitioner contends that even *West v. Louisiana*, 194 U. S. 258 does not support the right of a court to do what the Pennsylvania court has sought to do; but if *West v. Louisiana* does support such a proposition then *West v. Louisiana* stands alone, is wrong, and should be overruled.

VII. The Opinion of the Supreme Court of Pennsylvania Does Not Meet the Issues.

The Opinion is reported at 362 Pa. 259.

At page 264 the Opinion says that petitioner "refrained" from being present when the jury visited the Tavern. Probably this is a clerical error. It is clear that petitioner did not *refrain* from doing anything. He was physically *restrained* from being present, and other language in the Opinion admits as much. He was in a cell. It is as though he had been tied to a tree to prevent his attending the view.

At page 266 the Opinion says that the jury was taken to the "right place". This is correct only if the Stipulation is both accurate and binding upon petitioner. Petitioner does not have the slightest idea of whether the jury was taken to the right place or not. He was not there.

At page 266 the Opinion says that it would have been improper to have permitted any testimony to be received or any discussion to have been indulged in during the view. But a discussion and the virtual taking of testimony must have occurred during the view. How else could the *change* in the location of the main entrance to the barroom from the side wall to the front wall of the building have been pointed out to the jury? (See paragraph 4 (b) of the Stipulation at page 4 of the Supplemental Record). Changes do not have tongues and fingers. Neither do entrances. They do not point themselves out to people. Someone must have said to the jury something to the effect that "There is where the entrance was and here is where it is now". If that is not the taking of testimony or the discussing of a change, what is? Surely the fact that the witness who pointed this out to the jury was not under oath does not cure the error. It is entirely conceivable that someone may have said to the jury "There is the door through which poor Hellerman or Wunsch came". Petitioner can only speculate. The fact that no stenographer attended the view makes it impossible for him to know what was said.

At page 267 the Opinion says:

> "The attorneys for the respective parties are usually present but they take no active part. Neither can offer or object to, any evidence, or ask any questions. They must remain passive and mute. The prisoner, if present, must do likewise."

This simply is not true of petitioner's case. Pages 272, 273 of the record show that the judge told the jury that the district attorney and trial counsel for defendant would answer any questions the jury might have. And the Stipulation (paragraphs 3 and 4, at page 4 of the Supplemental Record) says that the court *at the request of the district attorney, the assistant district attorney and counsel for the defendant* directed the attention of the jury to various objects. In the light of these facts petitioner is unable to

understand why the Supreme Court of Pennsylvania said that the attorneys took no active part and remained passive and mute.

At the bottom of page 268 and the top of page 269, the Opinion says that at a viewing there are no witnesses for the accused to face. The same statement is made in the footnote at the bottom of page 274. This is not accurate as applied to petitioner's case. The Stipulation says (paragraph 3, page 4 of the Supplemental Record) that three witnesses for the prosecution were present at the view.

At page 270 the Opinion says that it was all right for the jury to view the tavern during petitioner's enforced absence and thus gain knowledge to be used in reaching a verdict. The Opinion justifies this by pointing out that in reaching a verdict jurors often use knowledge which they acquire in their day to day life. Of course that is true, but it does not have anything to do with this case. What petitioner is complaining about is the fact that the jurors qua jurors, *after having been sworn,* were given information in his absence.

At page 271 the Opinion says that the knowledge which the jurors acquired during the view is not evidence. But the trial court instructed the jury (880):

> "You had the opportunity to visit the premises to better enable you to understand the description of the premises and the various places therein from the witnesses."

To visit a place and understand something *better* as a result of such visit is by hypothesis to understand that thing *differently* than it would have been understood without such a visit. By what right does Pennsylvania hold that a jury's understanding of the facts of a case can be changed by information given them in the absence of the defendant? If the information was evidence, the defendant should have been present. If the information was not evidence, the court and the prosecutors had no right to submit it to the

jury and then instruct the jury to allow the information to improve (i. e. change) their understanding of the case but that is what they did.

VIII. The Trial Court's Charge Regarding the "Presumption" from the Use of a Deadly Weapon Violated Due Process.

The evidence of the Commonwealth was that the fatal shot was fired by Zietz with his left hand, at a distance of 10 to 20 feet from Kelly, the decedent, apparently backward and over his shoulder, while Zietz was driving the car and shifting gears with his right hand. The writer of this brief is informed that Zietz is right handed, but the record does not disclose which he is and the fact that he was driving with one hand and firing with the other warrants either inference. The shot was fired by Zietz while he and the other defendants were departing from the tavern. Kelly had not been inside the tavern during the hold-up and was not attempting to hinder the defendants. He was just standing there (R. 581-584, 591, 608, 611, 820-821).

Under such circumstances when a man who may have been right-handed fires a shot backward over his shoulder with his left hand while he is driving an automobile and shifting gears with his right hand it is ludicrous to contend that even a rebuttable presumption of an intent to kill exists.

Yet the trial court charged the jury (R. 875):

> "One who uses a deadly weapon upon another at some vital part with a manifest intention to use it upon him, must in the absence of qualifying facts be presumed to know that his act is likely to kill, and knowing this, must be presumed to intend death, which is the probable and ordinary consequence of such an act. Furthermore, when one so uses a deadly weapon upon another without sufficient cause or provocation, he

must be presumed to do it wickedly or from a bad heart."

Petitioner assigned this part of the charge as error in the Supreme Court of Pennsylvania and expressly asserted that it had violated due process (947, 948). Since the specific intent that death should result, i. e., the intent to kill, is an essential of first degree murder, where the murder is not perpetrated in the commission of one of the enumerated felonies, this part of the judge's charge may have been decisive in the minds of the jurors.

Perhaps the Commonwealth will contend that the presumption from the use of a deadly weapon had nothing to do with petitioner's case since the evidence indicates that petitioner and his accomplices had perpetrated a hold-up inside the tavern just before Zietz shot Kelly outside the tavern. But petitioner's contention is not affected by this. The trial court submitted this case to the jury not only on the basis of a murder committed in the perpetration of a robbery but also on the *alternative* basis of a murder perpetrated with the specific intent to kill. Nobody will ever know on what basis the jurors convicted petitioner, or whether some of the jurors convicted on one basis and others on the alternative basis. If either basis was incorrectly submitted, prejudice necessarily resulted, and the judgment must be reversed. *Kotteakos v. United States,* 328 U. S. 750; *Bollenbach v. United States,* 326 U. S. 607; *Williams v. North Carolina,* 317 U. S. 287; *Stromberg v. California,* 283 U. S. 359; *Commonwealth v. Hirack,* 360 Pa. 1, 6; *Commonwealth v. Woolley,* 259 Pa. 249; *Commonwealth v. Greene,* 227 Pa. 90; *Commonwealth v. Deitrick,* 221 Pa. 7, 13. Furthermore, apart from the naked questions of petitioner's guilt or degree of guilt, the trial court's instruction that the jury were compelled to find that Zietz intended to kill Kelly must have heavily weighed the scales in favor of the death penalty.

Since the so-called "presumption" from the use of a deadly weapon is a presumption which lacks any basis in

reason, a federal question is present. See *Tot v. United States,* 319 U. S. 463, 467; *Heiner v. Donnan,* 285 U. S. 312, 325, 326, 327.

The following simple hypothetical case illustrates the fact that the "presumption" has no basis in actuality and the fact that there is no rational connection between that which is proved and that which is presumed. Consider the case of A, who aims a gun at B with the manifest intention of hitting B's little finger. But the aim of A is bad and he shoots B through the heart, killing B. Nothing could be clearer than that A did not intend to kill B. But he used a deadly weapon upon a vital part of B with a manifest intention to use it upon some part of B and therefore, under the charge of the court, there would be a presumption that A intended to kill B. That is ridiculous. And the hypothetical case is not much different from petitioner's case in view of the way in which Zietz fired.

Petitioner asserts that such a presumption, even if it be regarded as a rebuttable presumption, violates reason (*Manley v. Georgia,* 271 U. S. 1), strips the defendant of the presumption of innocence, and therefore violates due process. See *Tot v. United States,* 319 U. S. 463, 467, 469; *Bailey v. Alabama,* 219 U. S. 219, 236. The fact that it may not violate due process in a particular case, to apply a presumption broader than the facts of that case, does not make any difference. A large proportion of those who kill persons with guns do not intend to kill. The "presumption of perfect marksmanship" is completely out of touch with reality. Its application therefore violated due process.

IX. Conclusion.

Snyder v. Massachusetts accords neither with the decisions which preceded it nor with the decisions that have followed it. Justice Cardozo's theory that the harmless error rule applies to the right to be present is no longer the law of the land and should be discarded. Furthermore, petitioner's case is different from *Snyder v. Massachusetts*

and therefore even the reasoning of *Snyder v. Masschusetts* indicates that due process was violated.

The "presumption of perfect marksmanship" indulged in by the Pennsylvania court also violates due process.

Accordingly, certiorari should be granted.

Respectfully submitted,

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